(4)

Supreme Court, U.S.
FILED
MAR 8 - 2004
OFFICE OF THE CLERK

No. 03-1116

In The Supreme Court Of The United States

JENNIFER M. GRANHOLM, GOVERNOR, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 35 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
**Counsel of Record*
State Solicitor
STEPHEN P. CARNEY
Senior Deputy Solicitor
PETER M. THOMAS
Assistant Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3400
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

RICHARD F. ALLEN
Acting Attorney General
State of Alabama

TERRY GODDARD
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

CHARLIE CRIST
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

MARK J. BENNETT
Attorney General
State of Hawaii

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

STEVE CARTER
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

PHILL KLINE
Attorney General
State of Kansas

GREGORY D. STUMBO
Attorney General
Commonwealth of Kentucky

CHARLES C. FOTI, JR.
Attorney General
State of Louisiana

G. STEVEN ROWE
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

MIKE HATCH
Attorney General
State of Minnesota

JIM HOOD
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE MCGRATH
Attorney General
State of Montana

BRIAN SANDOVAL
Attorney General
State of Nevada

PETER C. HARVEY
Attorney General
State of New Jersey

PATRICIA A. MADRID
Attorney General
State of New Mexico

WAYNE STENEHJEM
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

PATRICK LYNCH
Attorney General
State of Rhode Island

LAWRENCE E. LONG
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General
State of Tennessee

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

JERRY W. KILGORE
Attorney General
Commonwealth of
Virginia

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General
State of Wisconsin

QUESTION PRESENTED

Under state law, the Michigan Liquor Control Commission generally bans out-of-state direct shipment of alcoholic liquor to consumers' doorsteps, but permits in-state licensed wineries to direct ship to consumers, and out-of-state wineries to import through in-state licensed wholesalers. Out-of-state wineries may also petition the State Liquor Control Commission for an order permitting them to ship wine directly to consumers in the State. Any denial of such a request may be appealed through the State court system. Section 2 of the Twenty-First Amendment to the United States Constitution expressly prohibits importation of alcoholic beverages into any state for delivery or use, in violation of the laws of the State. The Court of Appeals declared Michigan's alcoholic liquor importation law facially unconstitutional in violation of the Commerce Clause. The question presented is:

Does Michigan's regulation of the importation of beverage alcohol under the Twenty-First Amendment facially violate the Commerce Clause when it permits in-state licensed wineries to directly ship alcohol to consumers, but requires out-of-state wineries to import its products through licensed in-state wholesalers and to sell its products through licensed retailers or request permission of the Liquor Control Commission to bypass this distribution system and ship directly to consumers?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI* INTEREST 1

REASONS FOR GRANTING THE WRIT 4

I. The Circuits Are Irreconcilably Split As To Reasoning, Results, And Analysis Of Direct Shipment Regulation 5

II. Michigan's Petition For Certiorari Presents The Proper Vehicle For This Court To Resolve The Irreconcilable Split In The Circuits. 10

A. It is Vital That The Court Resolve This Issue Now. Further Percolation Will Not Clarify The Issues 11

III. The Sixth Circuit's Erroneous Decision Presents An Immediate Threat To The Core Concerns Protected By The Twenty-First Amendment—Consumption By Minors, Maintaining An Orderly Market, And Collection Of Taxes 12

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 14

Bainbridge v. Turner,
311 F.3d 1104 (11th Cir. 2002) 7, 10, 17

Beskind v. Easley,
325 F.3d 506 (4th Cir. 2003) 2, 7, 10, 16

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 7, 8, 10, 16

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 13

Crowley v. Christensen
137 U.S. 86 (1890) 15

Dickerson v. Bailey,
336 F.3d 388 (5th Cir. 2003) 7, 10

Heald v. Engler,
342 F.3d 517 (6th Cir. 2003),
rehearing *en banc* denied, *Heald v. Engler*,
2003 U.S. App. Lexis 23001
(6th Cir. Nov. 4, 2003) 7, 8, 13, 14

Page

Healy v. The Beer Institute,
491 U.S. 324 (1989) 13, 14

Indianapolis Brewing Co. v. Liquor Control Comm'n,
305 U.S. 391 (1939) 13

North Dakota v. United States,
495 U.S. 423 (1990) 13, 15

South-Central Timber Development, Inc. v. Wunnicke,
467 U.S. 82 (1984) 18

State Bd. of Equalization v. Young's Market Co.,
299 U.S. 59 (1936) 13

Swedenburg v. Kelly,
2004 U.S. App. Lexis 2337
(2nd Cir. Feb. 12, 2004) ..... *passim*

Western & Southern Life Insurance Co. v. State Board of Equalization,
451 U.S. 648 (1981) 19

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 13

Page

Statutes

N.C. Gen. Stat. 18B-109 (2003)
(enacted Aug. 7, 2003) 2

Va. Code Ann. 4.1-112.1 (Michie 2003)
(enacted July 1, 2003) 3

Webb-Kenyon Act, 27 U.S.C. 122 ..... 18, 19

Other Authorities

Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment,
85 Va.L.Rev. 353 (1999) 2, 15

Website of National Conference of State Legislatures,
www.ncsl.org/programs/lis/CIP/CIPCOMM/shiplegis03.htm 2

Free The Grapes,
www.freethegrapes.com 5

Superintendent's Message,
Ohio Division of Liquor Control,
www.liquorcontrol.ohio.gov/liquor1.htm 16

The Wine Web,
www.wineweb.com 17

STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 35 other States have a vital interest in this case, which implicates one of the core police powers reserved to the States—the power to regulate the transportation or importation of intoxicating liquors into the State. This case asks the Court to define the scope of the States' regulatory power under the Twenty-First Amendment, and also to resolve the interplay between that express constitutional grant of authority and this Court's Dormant Commerce Clause jurisprudence. Does section two of the Twenty-First Amendment empower States to prohibit shipment of alcohol directly to their residents by out-of-state producers, or does this State regulation violate the Dormant Commerce Clause? Similarly, may a State allow wineries located within its borders to ship their products directly to a resident in the State, while prohibiting wineries without a presence in the State from directly shipping their product to residents of the State? This case directly presents this conflict between the States' ability to regulate alcohol in order to protect the health, safety, and well-being of its citizens—a power explicitly recognized in the United States Constitution—and the opposing interest in allowing interstate commerce to flow unfettered.

The possibility that federal courts may eviscerate the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States. The *amici* States all have a strong interest in the resolution of this issue, as every State regulates in some manner the direct shipment of alcohol to its residents.[1] The intensity of State interest in alcohol

[1] State regulation is generally separated into three types. First, "reciprocity states" are those States that allow direct shipments only from States that afford the reciprocal privilege. The 13 states are California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. Second,

regulation, as well as the difficulty presented by conflicting Circuit decisions on the interplay between the Twenty-First Amendment and the Dormant Commerce Clause, is perhaps best reflected by the fact that in the year 2003 alone, 26 state legislatures entertained bills to amend or create direct shipping legislation. *See Website of National Conference of State Legislatures.*[2] States that have had their alcohol shipment regulations struck down by courts as violating the Dormant Commerce Clause have enacted new laws on the issue. The Fourth Circuit struck down North Carolina's statute in April 2003. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). By August 2003, North Carolina had enacted new liquor shipment regulation. *See* N.C. Gen. Stat. 18B-109 (2003) (enacted Aug. 7, 2003).

Another State revised its statute while a legal challenge to the regulatory scheme was pending in the courts. The Virginia legislature enacted legislation that ended Virginia's express prohibition on alcohol shipments direct to

---

"limited personal importation states" are those States that allow direct shipment of alcohol in limited amounts if certain State requirements are met. An example of such special requirements is Vermont's system, which requires the consumer to receive a shipping permit from the State. The 23 limited personal importation States are Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and Wyoming. Third, "express prohibition States" are those States that simply ban all direct shipments of alcohol. The 15 express prohibition States are Arkansas, Delaware, Indiana, Kansas, Kentucky, Maine, Massachusetts, Maryland, Mississippi, Montana, New York, North Dakota, South Dakota, Tennessee, and Utah. *See* Vijay Shankar, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 Va.L.Rev. 353, 356-57, n.20, 22, 24 (1999) (States have been re-classified from what appears in the article due to statutory changes since 1999).

[2] www.ncsl.org/programs/lis/CIP/CIPCOMM/shiplegis03.htm (visited February 24, 2004).

residents—a prohibition that had been in place for 69 years, since the repeal of Prohibition. Virginia now allows limited personal importation of wine by allowing out-of-state wineries to ship limited quantities of wine direct to Virginia residents. Va. Code Ann. 4.1-112.1 (Michie 2003) (enacted July 1, 2003). Such quick responses by the States' legislatures highlights the importance the issue of regulating alcohol shipping presents to the States.

This Court has heard cases interpreting the power of the States to regulate alcohol under the Twenty-First Amendment many times in various contexts. This Court has never articulated, however, a test for analyzing the interplay between the Dormant Commerce Clause and the States' power under the Twenty-First Amendment. Further, this Court has not addressed the States' authority to regulate interstate shipment of alcohol since the advent and growth of the Internet and electronic commerce, tools that have dramatically increased such shipments. Only this Court can clarify the boundaries between the Twenty-First Amendment and the Dormant Commerce Clause, thereby clearly delineating the scope of State authority.

The current Circuit split on this issue means that States are receiving no clear guidance as to the extent of permissible regulation of alcohol shipments. Moreover, the split exposes the States to varying treatment depending on the Circuit in which the issue arises. In short, this case has a significant impact on all the States, not just those in the Sixth Circuit. Because of the disparity in the tests that are applied to the States' regulatory schemes depending on the Circuit, schemes may be declared unconstitutional because of the test the court elects to apply rather than the because of the substance of the law. The *amici* States therefore urge this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least three reasons. First, the split among the Circuit Courts on the issue of whether States may prohibit direct shipment of alcohol by out-of-state wineries is both clearly developed and deep. Further percolation in the Circuits offers no benefits. The Seventh Circuit and the Second Circuit have given a straightforward reading to the Twenty-First Amendment and the powers granted therein to the States to regulate shipments of alcohol into the States. Under this analysis, these two Circuits have upheld State regulation of alcohol shipments within their borders. The Fourth, Fifth, Sixth, and Eleventh Circuits, by contrast, have chosen to apply traditional Commerce Clause analysis to alcohol shipment laws. Under this approach, however, no Circuit Court has ever found a State regulation on alcohol shipping to be valid.

These competing cases, which involve vastly different treatment of virtually identical regulatory schemes, have created an irreconcilable conflict, both as to mode of analysis and as to result. Michigan's certiorari petition clearly presents this irreconcilable split among the Circuits. Michigan's regulatory scheme, similar to schemes of the other 20 "limited personal import" States, regulates shipments of alcohol into the State by out-of-state entities differently from how it regulates in-state shipments. As Michigan's regulation is plainly authorized by the Twenty-First Amendment, this regulatory scheme would be found a valid exercise of State power if reviewed by the Seventh or Second Circuit, but was struck below here.

Second, it is important for the Court to consider this issue now. Six Circuits have already weighed in, and the competing arguments are well-developed. Thus, further percolation would offer little, if any, benefit. Moreover, the

recent proliferation of small-production wineries, whose sole marketing and sales agenda is direct shipment with sales made over the internet, means that this area of regulation is increasingly important—both to the States from a police power perspective, and to wineries and consumers from an interstate commerce perspective. *See* www.freethegrapes.com (visited February 25, 2004).

Third, the Sixth Circuit's decision, by applying an erroneous analysis of the States' Twenty-First Amendment authority, results in a constitutional amendment by judicial fiat. The Sixth Circuit, along with the Fourth, Fifth, and Eleventh Circuits, edits section two of the Twenty-First Amendment from the Constitution. Review is particularly important because the Sixth Circuit's decision and analysis strikes directly at the heart of federalism. The decision by the Sixth Circuit fails to respect the power granted to the States by the Twenty-First Amendment to regulate delivery or use of alcohol within the State. The States have a significant interest in exercising their police powers to protect the health safety and welfare of their citizens in the area of alcohol shipping. The States need to know how alcohol regulations are going to be analyzed by the courts so that they are able to properly craft state legislation that reflects the public policy in the separate States concerning alcohol shipping. As proven by the failure of national alcohol regulation, Prohibition, the most effective regulation of alcohol is performed at the State level.

I. The Circuits Are Irreconcilably Split As To Reasoning, Results, And Analysis Of Direct Shipment Regulation

As the Second Circuit explained just weeks ago, the split on the question presented here reflects "the competing demands of the Twenty-First Amendment's grant of authority

to the states to regulate the intrastate traffic of alcohol, with the power reserved to Congress under the Commerce Clause '[t]o regulate Commerce . . . among the several States'" (internal citations omitted). *Swedenburg v. Kelly*, 2004 U.S. App. Lexis 2337 (2nd Cir. Feb. 12, 2004), *5. An irreconcilable conflict has arisen among the six Circuits that have considered the issue as to how to analyze this interplay.

"Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, . . . in which the statute is first examined in the context of the dormant Commerce Clause." *Id.* at *14-15. These four Circuits, the Fourth, Fifth, Sixth, and Eleventh Circuits, require a federal court to first examine the State statute under Dormant Commerce Clause case law. Then, if the challenged law is of questionable validity under that analysis, the court must determine whether the statute is "saved" by the Twenty-First Amendment.

Two other Circuits, however, the Second and the Seventh, have not only reached different results, but have applied a different legal test. "A second mode of analysis recognizes that '[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution,' and considers each 'in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Id.* at 11. Thus, under this approach, the court first considers the scope of the Twenty-First Amendment's grant of authority to the States to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the Dormant Commerce Clause. *See id.*

The split first arose in 2002 when the Eleventh Circuit found Florida's laws on direct shipping violated the Dormant Commerce Clause and adopted the traditional Dormant Commerce Clause analysis as the test for balancing the

Twenty-First Amendment power with Dormant Commerce Clause concerns. *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). In doing so, the Eleventh Circuit directly rejected the approach used in an earlier Seventh Circuit decision that denied a Dormant Commerce Clause challenge to Indiana's direct shipping laws. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). In rejecting *Bridenbaugh*, the Eleventh Circuit stated, "We disagree with the analytical framework used in that case and are skeptical of its assessment of the facts." *Bainbridge*, 311 F.3d at 1114 n.15. Unlike the Eleventh Circuit's "Dormant Commerce Clause first" approach, the Seventh Circuit had first analyzed whether Indiana's statute was within the ambit of the Twenty-First Amendment's grant of authority to the States to regulate importation of alcohol into the State, and thus, entirely exempted from the effect of the Dormant Commerce Clause. *Id.* at 854. Under this method of analysis, perhaps not surprisingly, the Seventh Circuit held that Indiana's statutes were insulated from Dormant Commerce Clause analysis because the laws were directly authorized by section two of the Twenty-First Amendment. *Id.*

Since that time, the split has continued to grow. The Fourth, Fifth, and Sixth Circuits have all weighed in. Each, like the Eleventh Circuit, rejected the Seventh Circuit's approach. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) ("We determine first whether the purported State regulation violates the Commerce Clause without consideration of the Twenty-First Amendment."); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) ("Under controlling precedent in this Circuit and in the Supreme Court, we are required to assess first whether these statutes violate the Commerce Clause, and, if we so determine, we must then ask whether they are saved by section 2 of the Twenty-First Amendment."); *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), rehearing *en banc* denied, *Heald v. Engler*, 2003 U.S. App. Lexis 23001

(Nov. 4, 2003) ("The proper approach in this case, then, is to apply the traditional Dormant Commerce Clause analysis."). The Sixth Circuit decision here followed the traditional Commerce Clause test (*i.e.*, the Eleventh Circuit approach) and made an initial determination that Michigan's statute facially discriminated against out-of-state wineries, thus applying a strict-scrutiny analysis. The court then required the State to establish that it had no reasonable nondiscriminatory means to advance the "core concerns" of the Twenty-First Amendment. Under this analysis, not surprisingly, all of the Circuit Courts, including the Sixth Circuit, held that the State regulations violated the Dormant Commerce Clause. And there can be little doubt that the Sixth Circuit understood itself to be using a different approach than the Seventh Circuit. Indeed, the court was openly critical of the Seventh Circuit's analysis: "*Bridenbaugh* . . . has been criticized by several federal courts for its failure to engage in the requisite dormant Commerce Clause analysis." *Heald*, 342 F.3d 526-27.

While the majority of Circuits to consider the issue have sided with the Eleventh, the split is still very much alive. Indeed, in the weeks since Michigan filed its certiorari petition in this case, the Second Circuit expressly adopted the Seventh Circuit rationale in upholding a New York direct shipment of alcohol law. On February 12, 2004, the Second Circuit adopted the method of analysis used by the Seventh Circuit and denied a Dormant Commerce Clause challenge to New York's direct shipment laws. *See Swedenburg*, 2004 U.S. App. Lexis 2337 at *33-40. In short, the split among the Circuits is pronounced and growing.

Moreover, the split is more than a mere difference in language; the tests are different in important ways. As noted so simply by the Second Circuit, "The inquiry, in our view, should not allow the protective doctrine of the dormant

Commerce Clause to subordinate the plain language of the Twenty-First Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces interact in light of the impact the Twenty-First Amendment has on dormant Commerce Clause concerns." *Id.* at *18. The Fourth, Fifth, Sixth, and Eleventh Circuits' "Dormant Commerce Clause first approach" effectively edits section two of the Twenty-First Amendment from the Constitution by judicial fiat. The Seventh and Second Circuits have recognized that the Twenty-First Amendment has meaning and that the most logical way to give purpose to that meaning is to apply a straightforward reading: States have the power to prohibit alcohol shipments that are inconsistent with their laws. State laws regulating the shipment of alcohol are more likely to survive in a paradigm that recognizes the full scope of the Twenty-First Amendment than one that does not, and the results to date clearly bear this out.

Nor will this Circuit split simply disappear left to its own devices. Interested parties have already filed lawsuits challenging alcohol shipping laws in the Ninth Circuit (Arizona), Third Circuit (New Jersey), Sixth Circuit (Ohio), and First Circuit (Rhode Island).[3] With the widening Circuit split and the numerous pending challenges to States' direct shipping laws, the need for this Court to provide the necessary guidance is paramount.

---

[3] *See* www.wswa.org/public/legal/direct.html (visited on February 24, 2004).

II. Michigan's Petition For Certiorari Presents The Proper Vehicle For This Court To Resolve The Irreconcilable Split In The Circuits.

The Sixth Circuit's decision squarely presents the question of the extent of the States' authority to regulate alcohol shipments for this Court's review. Michigan's law provides a perfect example of typical State efforts to regulate alcohol shipments. Michigan operates a three-tier distribution system, similar to many States. Michigan Pet. at 2. It requires that consumers purchase and receive alcoholic beverages from licensed in-state retailers; that retailers purchase them from licensed wholesalers; and that wholesalers purchase them from licensed manufacturers. *Id.* Michigan has a limited exception to the three-tier system for licensed in-state wineries. These wineries may directly ship only *their* wine products to consumers in Michigan. *Id.* Michigan has no system for licensing direct shipment of alcohol from out-of-state wineries; they must ship through the three-tier system. Michigan's system is very similar in these respects to the Texas law analyzed in *Dickerson*, the Indiana law analyzed in *Bridenbaugh*, the Florida law analyzed in *Bainbridge*, and the North Carolina law analyzed in *Beskind*. All these laws prohibited direct shipment to residents by out-of-state entities, and allowed in-state wineries to ship directly to residents to some degree. Thus, Michigan's law squarely presents the conflict between the Twenty-First Amendment power of States to regulate alcohol shipments and the Commerce Clause interest in unfettered flow of commerce.

A. It is Vital That The Court Resolve This Issue Now. Further Percolation Will Not Clarify The Issues.

While the split among the Circuits widened with the recent decision of the Second Circuit in *Swedenburg*, Michigan's petition for certiorari presents the best vehicle for this Court to address the constitutional questions presented. Every State regulates alcohol in some way. Every State also regulates how alcohol is delivered into the State—specifically, some States allow direct shipment to consumers, and some do not. The issue that Michigan's petition presents, and that the *amici* States urge this Court to review, is what standard of legal analysis shall be applied to properly delineate the boundaries of the Twenty-First Amendment and the Commerce Clause. The exact regulation or scheme of a particular State, *Amici* believe, should not impact this Court's ultimate conclusion as to what is the proper legal analysis the Circuits must apply when reviewing these alcohol shipping regulations. For that reason, *amici* States urge this Court to grant Michigan's petition. There is no need to await a different case—the legal issue is framed and ready for decision.

The factual details of the different regulatory schemes enacted by the States to regulate shipment of alcohol into their borders are not an impediment to this Court's decision to grant certiorari in this case. Michigan and the *amici* States urge this Court to accept jurisdiction in Michigan's case to give broad guidance to all 50 States in enacting legislation pursuant to the Twenty-First Amendment, as well as to the courts that determine the constitutionality of those laws. Specifically, *amici* urge this Court to take this case to announce to the States and the Circuits the proper interplay of the Twenty-First Amendment and the Commerce Clause, regardless of any specific liquor law or regulation.

Independent of a particular fact pattern, the conflict would not disappear even if all States re-wrote their direct shipping laws tomorrow to allow unregulated direct shipping into the States by out-of-state wineries. Challenges to State liquor regulations using the Dormant Commerce Clause as a sword will continue. On February 20, 2004, Costco filed a lawsuit in Washington State challenging the State's prohibition against quantity discounts to liquor retailers, alleging that the prohibition violates the Commerce Clause. *See Costco Challenges Three Tier System in Washington State*, www.winebusiness.com/SalesMarketing/ (visited February 25, 2004). This recent lawsuit illustrates that Commerce Clause challenges to the States' Twenty-First Amendment power to control their liquor system will not simply disappear. The interplay between the Twenty-First Amendment and the Dormant Commerce Clause needs to be clearly defined by this Court. The *amici* States ask this Court to grant Michigan's petition, examine the interplay of the Twenty-First Amendment and the Commerce Clause and provide guidance and clarity.

III. The Sixth Circuit's Erroneous Decision Presents An Immediate Threat To The Core Concerns Protected By The Twenty-First Amendment—Consumption By Minors, Maintaining An Orderly Market, And Collection Of Taxes.

The Sixth Circuit's decision, as well as those by other Circuits on that side of the split, dramatically undermines the States' "virtually complete control" over whether to permit the importation or sale of liquor and eviscerates the States' ability to control and structure their liquor distribution systems. Michigan's petition for certiorari presents this Court with the opportunity to restore the balance of Federalism and re-affirm that it is a matter of States' rights to determine how to structure their liquor control systems.

As this Court has noted, the States' Twenty-First Amendment power is such that "the States have virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). "By reason of the Twenty-First Amendment the States possess greater authority to regulate commerce in beer than they do commerce in milk." *Healy v. The Beer Institute*, 491 U.S. 324, 346 (1989) (Rehnquist, C.J., dissenting). Instead of recognizing that regulating the shipment of alcohol is the "exercise of a power expressly conferred upon the States" by the Twenty-First Amendment, the Sixth Circuit erroneously determined that under a Commerce Clause analysis the States' "virtually complete control" over liquor regulation, noted by this Court in *North Dakota v. United States*, 495 U.S. 423 (1990) and *Midcal, supra*, "has little value." *Heald*, 342 F.3d at 524. This approach to interpreting the interplay of the Twenty-First Amendment and the Dormant Commerce Clause ignores decisions by this Court dating back to 1936 regarding the proper interpretation of the Twenty-First Amendment—decisions that have never been overruled by this Court. *See State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (the Twenty-First Amendment confers upon the State the power to forbid all importations that do not comply with the conditions that it prescribes); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (the Twenty-First Amendment confers upon the State the power to forbid all importations which do not comply with the conditions which it prescribes). The Sixth Circuit went so far as to state that Michigan's reliance on these decisions was "disingenuous at best . . . ." 343 F.3d at 522. It did so

despite this Court's ruling, a mere eight years ago, that "the Twenty-First Amendment limits the effect of the Dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, ..." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

Instead of applying a straightforward reading of the Twenty-First Amendment, the Sixth Circuit relied upon a number of this Court's decisions from 1960 onward that it described as developing away from a straightforward reading of the Twenty-First Amendment and into a "balancing test" analysis. *Heald*, 343 F.3d at 523. In commenting on the Court's evolving analysis of the Twenty-First Amendment, Chief Justice Rehnquist has stated strongly, "The result reached by the Court in these cases can only be described as perverse. A proper view of the Twenty-First Amendment would require that States have greater latitude under the Commerce Clause to regulate producers of alcoholic beverages than they do producers of milk. But the Court extends to beer producers a degree of Commerce Clause protection that our cases have never extended to milk producers." *Healy v. The Beer Institute*, 491 U.S. 324, 348 (1989) (Rehnquist, C.J., dissenting). The Sixth Circuit erred in analyzing alcohol as it would cheese or any other item of commerce. Alcohol is necessarily a different commodity with regard to the Commerce Clause because of the Twenty-First Amendment. A plain reading of the Twenty-First Amendment shows a grant of authority to the States to regulate the transportation and importation of alcohol into their borders.

The *amici* States all regulate alcohol sales, transportation and importation to some degree. Most States, after Prohibition was repealed, adopted the "three-tier" system of alcohol regulation. *See* Vijay Shankar, Note,

Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment, 85 Va.L.Rev. 353, 355 (1999). In the three-tier system, a manufacturer may sell only to a wholesale permit holder; a wholesaler may sell only to a retail permit holder; and a retailer may then sell to consumers. The application process for each of these permits is rigorous to ensure that only reputable individuals and companies enter the alcohol business. The need for States to exercise heightened police powers to regulate alcohol sales and use has been noted by this Court: "It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely." *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

While specific requirements for obtaining and keeping a permit to transact business in alcohol vary from State to State, "the requirements facilitate the [States'] role in generating and collecting tax revenue, and in ensuring that licensees comply with the provisions of [the States'] regulatory scheme." *Swedenburg*, 2004 U.S. App. Lexis 2337 at *8. This Court has acknowledged, "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

The ability of the States to adequately enforce their permit systems has significant revenue implications for the State Treasuries. "[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the

anticipated legal penalties." *Bridenbaugh*, 227 F.3d at 850. The Sixth Circuit decision striking down Michigan's direct shipment laws will undermine the State's ability to regulate alcohol shipped into the State, as producers are now able to bypass the State system and deliver alcohol direct to consumers. This will inevitably lead to a decrease in revenue generated by Michigan's permit system due to underreporting of use and sales tax by purchasers.[4] Striking down direct shipment laws will significantly impact this important revenue stream during a time when State budgets are constricting. Collection of taxes from out of state entities present difficulties of its own.

The ability of a regulating State to act against an alcohol seller, be it by way of fine, license suspension, or license revocation, will only compel a permit holder to comply with State laws if the disciplinary action can be adequately imposed on the permit holder. The Circuit Courts in their decisions on direct shipment laws have not adequately addressed this legitimate concern.

In *Beskind*, North Carolina specifically argued to the court the difficulty of physical inspections, tax collection, and the deterrent effect of revoking a license, as reasons to limit direct shipment by out of state wineries. 325 F.3d at 515-16. An in-state winery that violates the law and has its

[4] As an example of the types of revenue generated by liquor regulation, in 2003, the State of Ohio, Division of Liquor Control, from permit fees alone, distributed revenues of $27,600,000. Superintendent's Message, Division of Liquor Control. www.liquorcontrol.ohio.gov/liquor1.htm (visited February 25, 2004). The total liquor sales tax and revenue generated by the Ohio Division of Liquor Control in fiscal year 2002 was $194,200,000. *Id.* Other States generate revenues similar to Ohio's revenues via the liquor permit and tax collection system. Kansas reports for fiscal year 2002 Liquor Excise Tax receipts of $26,459,514; Alabama reported total revenue in fiscal year 2002 from sales, taxes, and permits in alcohol of $157,508,329.

license revoked would no longer be able to produce wine, while an out-of-state winery would only be forbidden to ship into North Carolina. *Id.* The Fourth Circuit essentially dismissed these issues by stating, "North Carolina could satisfy its concerns by requiring out-of-state wineries to import their wine into North Carolina to an in-state location and by treating that location in the same manner as it treats in-state winery locations." *Id.* While maintaining an in-state location may help to resolve some of these concerns, it does nothing to address the license revocation issue. Given that there are over 3000 wineries in this country alone,[5] allowing direct shipment with no State oversight can quickly balloon into a huge loss of control of alcohol sales and revenue from the permit sales systems in place in the several States.

Similarly, the Eleventh Circuit dismissed with little discussion legitimate State concerns about the ability to enforce laws against out-of-state entities. Florida argued that "[t]he threat of loss of a beverage license because of sale to underage consumers will better ensure that sale and delivery will only be to qualified consumers." *Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002). The Eleventh Circuit concluded, however, that "[t]his means that the out-of-state-firm can equally be threatened with the loss of a beverage license if it illegally delivers alcohol to minors." *Id.* The dissent in *Bainbridge* countered: "This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage license of an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state." *Id.* at 1116. Florida also noted the difficulty of collection from out-of-state entities as supporting the need to have those entities participate in the three-tier system. The court brushed this legitimate concern

[5] *See* www.wineweb.com (visited February 25, 2004).

aside, noting "[I]n-state wineries are taxed directly . . . . So why can't out-of-state firms be taxed directly, just like in-state wineries?" *Id.* at 1115. The court missed the point—it is precisely because the firms are located outside the state that tax collection is difficult. The dissent succinctly stated: "The jurisdictional barriers to enforcement of Florida's beverage laws against out-of-state firms selling and delivering directly to consumers justifies the constitutionality of the statutes claimants seek to hold unconstitutional." *Id.* at 1116. As a result of improper use of traditional Commerce Clause analysis, the courts disregard States' concerns that are properly addressed by their police powers and the grant of authority by the Twenty-First Amendment.

Moreover, those Circuits that have elevated the Dormant Commerce Clause to the point of eliminating section two of the Twenty-First Amendment have failed to recognize that by enacting the Webb-Kenyon Act, Congress exercised its Commerce Clause authority and empowered the States to regulate shipment of alcohol into their borders. The Webb-Kenyon Act, 27 U.S.C. 122, enacted in 1917 and re-enacted in 1933, states: "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of any law of such state . . . is prohibited." The Commerce Clause is not dormant in the area of alcohol shipping among the States; rather, Congress has expressly authorized the States to regulate alcohol shipping by enacting the Webb-Kenyon Act.

In *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 88-89 (1984), this Court stated, "It is equally clear that Congress may 'redefine the distribution of power over interstate commerce' by '[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" In the area of insurance, Congress has authorized the States to regulate an item of interstate

commerce to the exclusion of the federal government. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55 (1981) (Discussing McCarron-Ferguson Act.). Similarly, Congress, by enacting Webb-Kenyon, expressly empowered States to determine how intoxicating liquor would be permissibly shipped into the States. The Webb-Kenyon Act does not pre-empt State regulation of alcohol shipments. Nor does it so completely "occupy the field" of liquor regulation so as to leave no room for State regulation. Instead, by prohibiting alcohol shipments into a State that are contrary to State law, Congress exercised its Commerce Clause power to expressly empower the States to regulate. The Commerce Clause is not dormant here.

By forgoing any analysis of the Twenty-First Amendment and instead rushing to apply traditional Dormant Commerce Clause analysis to a product that has been carved out of traditional Commerce Clause analysis by constitutional amendment, the Sixth Circuit invaded Michigan's police power to regulate transportation and importation of alcohol within its borders. Such violation of States' police powers is likewise the rule of law in the Fourth, Fifth, and Eleventh Circuits. The time has come for this Court to directly address this question.

The Circuit Court decisions concerning direct shipment of alcohol into a State lead to specific conclusions. First, the "Dormant Commerce Clause first" approach to a State's alcohol shipping regulation will result in a holding that the regulation violates the Commerce Clause. This mode of analysis ignores this Court's decisions that alcohol can be regulated in ways that other items of commerce cannot. Determining whether a State statute is an exercise of power expressly conferred by the Twenty-First Amendment properly balances States' authority and Commerce Clause

interests. Second, the decisions striking down State alcohol shipment laws have not adequately addressed the very real issues that will impact the health, safety, and welfare of the States' residents in the absence of a strong alcohol regulatory scheme. Finally, the specific details of any one state legislative scheme do not present either a better or worse case for this Court to review. All the Circuit Court decisions have reviewed factually different schemes. The common legal question presented is the interplay of power granted to the States by the Twenty-First Amendment and the Commerce Clause. Michigan's petition squarely presents this legal issue for determination. Michigan's petition presents a regulatory scheme that has been well-analyzed by a number of Circuit Courts.

The Court should grant certiorari on Michigan's petition, or, in the alternative, accept both Michigan's petition and any possible petition from *Swedenburg*. At a minimum, *amici* States ask this Court to hold the petition for review pending a potential filing in *Swedenburg*.

CONCLUSION

For the foregoing reasons, *amici* State of Ohio and 35 other States respectfully request that the Court grant the writ of certiorari.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
**Counsel of Record*
State Solicitor
STEPHEN P. CARNEY
Senior Deputy Solicitor
PETER M. THOMAS
Assistant Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3400
614-466-8980
614-466-5087 fax
Counsel for *Amici* States

March 5, 2004